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Religion and American Constitutions

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BOOK REVIEWS

RELIGION AND AMERICAN CONSTITUTIONS

by Wilber G. Katz

Northwestern University Press, Evanston, Illinois, 1964. Pp. 114. \$3.50.

Reviewed by

JOHN J. REGAN, C.M.*

Since the historic decision, *Everson v. Board of Educ. of Ewing Township*,¹ interpreters of the religion clauses of the first amendment, according to Professor Wilber Katz, have predominantly fallen into three schools of thought. At one extreme stand the "strict separationists," who see in the establishment clause an absolute prohibition against any governmental involvement with religion, even on a cooperative basis. At the opposite pole are theorists who find in the establishment clause only a prohibition against government's recognition of a particular church or sect as an established religion.

Professor Katz's book (the 1963 Rosenthal Lectures at Northwestern University) is among the growing volume of literature espousing the middle ground of "religious neutrality." Using Mr. Justice Black's "no aid" principle in *Everson*² as a starting point, he proposes a two-fold basis at the root of this neutrality. The first part of his central thesis is simple: government is required to be neutral between sects and between believers and non-believers. The

second part is more distinctive: if legislation admittedly within the power of government would have the effect of limiting religious freedom, then government may, in its discretion, grant exemptions from such legislation based on religious grounds or make special provisions to safeguard this freedom.

Before examining the implications of this thesis, it might be well to list in a general way some of the other expressions of the neutrality principle. The earliest statement of such a principle is the Black dictum in *Everson*:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.³

And later in the opinion:

[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.⁴

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¹ 330 U.S. 1 (1947).

² *Id.* at 15.

³ *Ibid.*

⁴ *Id.* at 18.

Professor Philip Kurland has also formulated a test embodying the neutrality principle:

The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.⁵

The latest neutrality principle, to be used for testing the constitutionality of legislation according to the establishment clause, was stated by the Supreme Court in *School Dist. of Abington Township v. Schempp*:

[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.⁶

The bulk of Professor Katz's concise book is devoted to an examination of certain controversial areas of government-religion relations in the light of these various neutrality principles. One significant issue is exemptions from general legislation granted to institutions or individuals because of their religious beliefs. Katz believes such exemptions are a necessary implication of the two religion clauses. A rigid devotion to the establishment clause might well lead to situations where religious freedom is limited, thus infringing rights guaranteed by the free exercise clause. On this basis he justifies religious

exemptions from Sunday closing laws and from compulsory military service. In Katz's view these exemptions "are not efforts to promote or establish religion, but merely to maintain neutrality—to see that the action of the government does not operate with hostility to religion."⁷ He argues further that legislatures are entitled to discretion in selecting measures reasonably calculated to achieve their ends. They need not grant the broadest possible exemptions nor enact exemptions which create enormous administrative problems.

State neutrality toward religion also calls for accommodations and even affirmative provisions by government toward other religious features of American life. Thus, Katz reasons that government may provide chaplains both for the armed forces and for prisons in order to safeguard the religious freedom of those thus restricted by governmental action. He defends federal grants and loans to hospitals conducted by religious groups and other private agencies as safeguards against governmental monopoly of an activity traditionally private and religious in nature.

Many of the author's comments about religion in public education have been confirmed by the Supreme Court in the *Schempp* decision. He agrees with the Court's opinion in *Engel v. Vitale*⁸ that the use of the Regents' prayer might have the effect of officially establishing a generalized Judaeo-Christian tradition. But he cautions against a "pedantic absolutism" in applying the neutrality principle to (1) public school ceremonies and songs which sometimes strike religious notes; (2) occasional personal expressions of religious

⁵ KURLAND, RELIGION AND THE LAW 112 (1962).

⁶ 374 U.S. 203, 222 (1963).

⁷ KATZ, RELIGION AND AMERICAN CONSTITUTIONS 20 (1964).

⁸ 370 U.S. 421 (1962).

belief by teachers or students as individuals; and (3) rules excusing adherents of particular faiths from school attendance on designated religious holidays. He believes that not all minor religious observances in public schools need be resisted, but only those which clearly have the shape of an entering wedge. He is sympathetic to released-time programs for religious instruction, but only if it could be assumed that programs where students are unconditionally dismissed would be no less successful. He considers the case of *Zorach v. Clauson*⁹ "clearly wrong in having refused to permit the plaintiffs to prove the coercive operation of the program."¹⁰

On the issue of governmental aid to private schools, Katz's position is consistent with his general thesis. "Religious schools may not be singled out for preferential aid, but they need not be excluded from a program of general aid, notwithstanding the fact that their inclusion results in indirect aid to religious teaching and practice."¹¹ The problem for him is not one of constitutional law, but one of legislative policy: "Shall we continue to discourage parochial schools?"¹² Their divisive effect is his chief concern. He sees hope for a reduction of this effect in "shared time" programs and, on a more profound level, in the Vatican Council's reconsideration of the traditional Catholic attitude toward religious liberty.

The chief value of Katz's book lies in his discussion of religious exemptions. His advocacy of these exemptions will not find wide acceptance, particularly among lawyers committed to a strict separation view. The issue seems to reduce itself to

one's interpretation of the purpose of the religion clauses. If the purpose be rigid separation of church and state, then these exemptions are indefensible. The Kurland approach, which demands a primary secular purpose in all legislation, leads to the same conclusion. But if, as Katz argues, the religion clauses are intended to promote religious freedom, then affirmative legislation furthering this goal is justified.

The problem then becomes one of setting the boundaries for legislative discretion. Failure by a legislature to provide for any exemptions may well result in a burden on religious freedom, as the Court noted in *Sherbert v. Verner*.¹³ Too many exemptions, on the other hand, may result in favoritism toward certain sects and may create a burden for the non-believer or non-member. The discussion of the problem by Katz is somewhat weak, in that he does little more than record the *Sherbert* decision in his Epilogue to the lectures.

The book is a worthwhile contribution to a much-discussed topic and merits consideration by all interested in the developing concept of religious neutrality. The basic thesis, originally espoused by the author in 1953,¹⁴ warrants closer analysis and deeper development in the light of recent cases than the scholarly professor has presented in this book.¹⁵

⁹ 343 U.S. 306 (1952).

¹⁰ KATZ, *op. cit. supra* note 7, at 50.

¹¹ *Id.* at 74.

¹² *Id.* at 77.

¹³ 374 U.S. 398 (1963).

¹⁴ Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953).

¹⁵ For more detailed treatments of this subject see, e.g., Moore, *The Supreme Court and the Relationship Between the "Establishment" and "Free Exercise" Clauses*, 42 TEXAS L. REV. 142 (1963); Dunsford, *The Establishment Syndrome and Religious Liberty*, 2 DUQUESNE U.L. REV. 139 (1964).